

United States
Circuit Court of Appeals

For the Ninth Circuit.

F. H. DUEHAY, Superintendent of Prisons of the
Department of Justice, O. P. HALLIGAN,
Warden of the United States Penitentiary,
McNeil Island, Washington, and J. J.
LEISER, Physician, United States Peniten-
tiary, McNeil Island, Washington,
Plaintiffs in Error,

vs.

FRED H. THOMPSON,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for
the Western District of Washington,
Southern Division.

Filed

FEB 2 - 1915

F. D. Monckton,
Clerk.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Counsel.

CLAY ALLEN, Esquire, U. S. Attorney, Federal Building, Seattle, Washington.

GEORGE P. FISHBURNE, Esquire, Asst. U. S. Attorney, Federal Building, Tacoma, Washington.

Attorneys for the Plaintiff in Error, and
JOHN J. SULLIVAN, Esquire, L. C. Smith Building, Seattle, Washington.

Attorneys for Defendant in Error. [2*]

*In the United States District Court for the Western
District of Washington, Southern Division.*

FRED H. THOMPSON,

Plaintiff and Defendant in Error,

vs.

F. H. DUEHAY, Superintendent, etc. et al.,

Defendants and Plaintiffs in Error.

Praeceptum for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare and certify to constitute the record on appeal in the above cause, typewritten copies of the following papers, omitting all captions, verifications, acceptances of service and other endorsements, excepting file marks. I hereby waive the provisions of the Act of February, 1911, in reprinting of transcripts on appeal:

1. This Praeceptum.
2. Complaint.
3. Answer.

*Page-number appearing at foot of page of original certified Record.

4. Order to Show Cause.
5. Decisions on Merits.
6. Order Extending Time to Take Appeal.
7. Stipulation and Order Extending Time to Appeal.
8. Findings of Fact, and
9. Conclusions of Law, and
10. Order on Foregoing.
11. Petition for Appeal.
12. Assignments of Error.
13. Order Allowing Appeal.

Dated this 16th day of November, A. D. 1914.

G. P. FISHBURNE,
Asst. U. S. Attorney.

“Filed in the U. S. District Court, Western District of Washington, Southern Division. Nov. 17, 1914. Frank L. Crosby, Clerk.” [3]

Complaint.

Comes now the plaintiff in the above-entitled action and complains and alleges:

I.

That F. H. Duchays is the Superintendent of Prisons of the Department of Justice; That O. P. Halligan is the Warden of the United States Penitentiary at McNeil Island, Washington; That J. J. Leiser is the Physician of the United States Penitentiary at McNeil Island, Washington.

II.

That on or about the 20th day of December, 1911, at the city of Los Angeles, State of California, and

in the United States District Court in and for the Southern Division of Southern California, your petitioner was convicted on two counts for receiving articles and things of value stolen from the United States mails in violation of Section 5470 of the Revised Statutes of the United States. That under and pursuant to the said judgment of conviction your petitioner was, by the Court, on or about the [4] third day of January, 1912, sentenced on the first of said counts to serve four years in the United States Penitentiary at McNeill Island, Washington, and to pay a fine of \$1,000.00; on the said second count was, by the Court, sentenced to serve four years in the said penitentiary and to pay a fine of \$1,000.00; said second sentence to commence at the expiration of the first of said sentences and to run consecutively to said first sentence.

III.

That on the 11th day of March, 1913, your petitioner did, under and pursuant to said judgment of conviction and said sentences enter the said penitentiary, and that your petitioner is now confined in said penitentiary.

IV.

That your petitioner after his conviction and sentences as aforesaid, made an application to the President of the United States for executive clemency. That on the 5th day of August, 1913, the President, having fully considered your petitioner's application for executive clemency and, after having been advised in the premises by the Attorney General of the United States, the Trial Judge and the District

Attorney who prosecuted your petitioner at his trial, and that the said officials and each and all of them having recommended to the President that your petitioner's case was a case where executive clemency should be granted, and the President being fully advised in the premises, believed that your petitioner's case was a case where executive clemency should be granted, and that parole on the then sentence would not afford him adequate relief, the President did on the said 5th day of August, 1913, issue his decree ordering and commuting your petitioner's two sentences to run concurrently instead of consecutively, and that your petitioner's two four-year sentences do now run concurrently. [5]

V.

That Congress on the 25th day of June, 1910, enacted an Act to Parole United States prisoners and for other purposes (S.870).

VI.

That the defendants under and by virtue of the terms of said Act compose and are the Parole Board for the said penitentiary.

VII.

That under and pursuant to said Act and the rules of said Parole Board approved by the Attorney General of the United States, all persons who are confined in the said penitentiary are permitted to apply for parole at the last regular meeting of the Parole Board held at said penitentiary prior to the time when they will have completed the total of the one-third of the term or terms of their sentence or sentences.

VIII.

That on July 10, 1914, your petitioner completed the total of one-third of the terms for which he was sentenced and that there accrued to him on the said 10th day of July, 1914, the right of parole.

IX.

That in the month of May, 1914, under and pursuant to the terms of the said Act the defendants, sitting as the Board of Parole for the said penitentiary, held a regular meeting for the considering of applications for parole of all prisoners confined in said penitentiary who would become eligible for parole under the said Act in the months of June, July and August, 1914.

That at the said meeting of the said Board your petitioner made an application to said Board for permission to file his application for a parole and to have the same considered by said Board.

That said Board refused to permit your petitioner to [6] to file his application for parole at the said meeting and refused to consider your petitioner's qualifications for a parole at the said meeting, for the reason, as your petitioner was informed by said Board, that they believed, under the terms of said Act, that your petitioner would not become eligible for parole until he had served a total of one-third of his original sentence, and that he would not become eligible for parole until November 9th, 1915.

X.

That the ruling of the said Board is unlawful, unjust, wrong and contrary to the terms of the said Act, and that unless your petitioner is granted relief

by this honorable Court your petitioner will be forced to wait in the said penitentiary until November 9, 1915, before he will be permitted the right of parole and that by reason of the erroneous, unlawful and wrongful ruling of said Board your petitioner will, unless granted relief by the Court, have to serve sixteen (16) months additional time in said penitentiary, and that your petitioner will be denied the equal rights, benefits and privileges of parole which is afforded to the other prisoners by the defendants herein.

XI.

That your petitioner has no plain, speedy or adequate remedy at law.

XII.

That your petitioner has conformed to all the rules and regulations of said penitentiary regarding the duty and obligations of prisoners and that he has not been punished or reprimanded for any misconduct or wrongful behavior.

XIII.

That the only reason for the refusal of the Parole Board to permit your petitioner to file his application for parole is the reason as aforesaid. [7]

XIV.

That your petitioner is without means to employ counsel or to pay the fees or necessary costs of court in this action.

XV.

That your petitioner is a native-born citizen of the United States and is entitled to all the rights accrued

to him under the former pauper's act, approved June 25, 1910. 36 Stat. 866.

WHEREFORE, your petitioner prays for an order of court that he may appear in *propria personam* to prosecute this action.

2d. That the necessary fees and costs of court be paid by the Government.

3d. That a writ of mandamus be issued by this Honorable Court commanding F. H. Duehay, the above-named defendant, to forthwith call a meeting of the Parole Board at McNiel Island and that the above-named defendants, and each of them, be commanded to forthwith receive your petitioner's application for parole and that the defendants, and each of them, be commanded forthwith to give your petitioner a fair, just and impartial hearing on his application for parole and that the above-named defendants, and each of them, be further commanded to forthwith do all and everything necessary to afford your petitioner full, complete and adequate relief.

4th. That the Court make and further order that it may deem necessary to afford your petitioner full and adequate relief.

FRED H. THOMPSON,

In Propria Personam.

State of Washington,
County of Pierce,—ss.

Fred. H. Thompson being duly sworn deposes and says, that he is the above-named plaintiff, that he has read the foregoing complaint, and that he knows the contents thereof and that the same is true excepting the facts stated on information and belief, and as

to those facts he believes them to be true.

FRED H. THOMPSON.

Subscribed and sworn to before me this —— day of
Sept. 1914.

[Seal]

NEIL O. HENLY,

Notary Public Residing at Bee, County of Pierce,
State of Wash. [8]

Filed in the U. S. District Court, Western District
of Washington, Southern Division. Sept. 29, 1914.
Frank L. Crosby, Clerk. By F. M. Harshberger,
Deputy. [9]

Answer.

Comes now the defendants in the above-entitled
action, and as an answer to the Complaint of Plaintiff
herein allege as follows:

I.

That they deny each and every allegation of the
Plaintiff's Complaint save and except what is here-
inafter specifically admitted:

II.

That they admit Paragraphs I, II, III, IV, V, VI,
VII and IX.

CLAY ALLEN,

United States District Attorney.

G. P. FISHBURNE,

Assistant District Attorney.

“Filed in the U. S. District Court Western Dis-
trict of Washington, Southern Division. Oct. 30,
1914. Frank L. Crosby, Clerk.” [10]

Order to Show Cause.

The Court having duly considered the complaint of the plaintiff in the above-entitled action and finding that the plaintiff therein is confined in the penitentiary and has no funds and that he desires to prosecute the action in his own person,

WHEREFORE, IT IS ORDERED:

1. That the action proceed in *forma pauperis* and that the necessary fees, costs and expenses of the action be paid by the United States.

2. That the above-entitled defendants appear on Monday, the 12th day of October, 1914, at 10 A. M., to show cause why a writ of mandamus should not be issued commanding the above-named defendants to receive the plaintiff's application for parole and give the plaintiff a fair hearing on his application for parole.

3. That the said defendant O. P. Halligan bring the prisoner before the Court to testify on his own behalf.

That a copy of this order together with a copy of the complaint be served on O. P. Halligan on behalf of all of the defendants.

Dated this 29th day of September, 1914.

EDWARD E. CUSHMAN,

Judge.

"Filed in the U. S. District Court, Western District of Washington, Southern Division. Sep. 29, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [11]

[Opinion.]

Decision, Filed October 31, 1914.

FRED H. THOMPSON, Petitioner—in Person.

CLAY ALLEN, United States Attorney—For Respondents.

GEO. P. FISHBURNE, Asst. United States Attorney—For Respondents.

CUSHMAN—District Judge.

This matter is before the Court, after evidence taken, upon petitioner's complaint and respondent's answer to the petition of relator for a writ of mandamus directing respondents, as the Board of Parole of McNeil Island Penitentiary, to receive the application of petitioner for parole and to give him a hearing thereon.

Petitioner was convicted upon an indictment in two counts and sentenced to four years imprisonment on each count—the sentences to run consecutively, not concurrently. That is, the second sentence to commence at the expiration of the first.

The President of the United States has commuted these sentences “to run concurrently.” The Parole Act provides:

“That every prisoner who has been or may hereafter be convicted of any offense against the United States, and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, whose record of conduct shows he has observed the rules of such institution, and who

has served one-third of the total of the term or terms for which he was sentenced, may be released on parole as hereinafter provided.”

“That nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case, or in any way impair or revoke such good time allowance as is or may hereinafter be provided by Act of Congress.” [12]

(Secs. 1, 10, 36; Stat. L., pp. 819, 821; Fed. Stat. Ann., Supp. 1912, vol. 1, pp. 304, 306.)

Petitioner sought to file with the Board of Parole and have considered, his petition for parole, offered under the rules adopted regulating hearings by the Board. Petitioner sought parole at the expiration of one-third of the four-year period covered by these concurrent sentences; but was denied the right to file such application and denied a hearing thereon, the Attorney General for the Board, advising him:

“Please inform the prisoner that the Department does not agree with his conclusion that he is eligible to parole when he has served one-third of the commuted sentence. It is the view of the Department that he must serve one-third of his original sentence of eight years.”

The respondents' claim is that the application for parole is premature; that the Board will not exercise its discretion and consider the application for that reason.

The act above quoted provides that “every prisoner * * * who has *served* one-third of the *total* of the term or terms for which he was sentenced may

be released on parole.” Does “one-third of the total term or terms” mean that, for the purpose of the parole law, the sentence imposed is unaffected by the commutation—although such commuted sentence supersedes, alters, changes and substitutes the new term for that imposed by the original sentence for every other purpose—in determining the time at which the parole law can be invoked? Such a construction is too narrow.

The good time law provides:

“That each prisoner * * * shall be entitled to a deduction from the term of his sentence to be estimated as follows: * * * Upon a sentence of not less than six months nor more than one year, five days for each month; upon a sentence of more than one year and [13] less than three years, six days for each month; upon a sentence of not less than three years and less than five years, seven days for each month; upon a sentence of not less than five years and less than ten years, eight days for each month; upon a sentence of ten years or more, ten days for each month. When a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated.” (32 Stat. L., 397; Fed. Stat. Ann., vol. 6, pp. 40, 41.)

Upon the argument it was stated without question that, in applying the good time law, upon commutation of a sentence, the good time is calculated as from the beginning on the length of term of the sentence as commuted and not upon the sentence as originally imposed. This practice would, certainly, be more

consonant with reason than that now contended for under the parole law.

No difference in the language of the two acts appears to show a different intent in this regard. The language of the act is "who has served one-third of the total term or terms for which he was sentenced."

By the sentences imposed by the Court, the two four-year terms were to run consecutively. These sentences were commuted "to run concurrently," that is, to run together, the time served running together upon both sentences. If this be so, the petitioner has served one-third of the total terms for which he was sentenced. To decree otherwise is to impair the power of the President to grant a commutation of sentence.

As one judgment is entirely wiped out and another substituted for it upon a new trial or appeal, which substituted judgment is complete and entire in and of itself, and for all purposes the only judgment given effect, so does the commutation, in effect, write a new sentence,—the only sentence that remains effective from the beginning. To deny this is to hold that the President did not, in reality, commute the sentence [14] as imposed; that he only partly commuted it, only commuted it for certain purposes. That is to say, that, notwithstanding the decree of commutation, for one purpose, the sentences do not, and shall not run concurrently.

The parole law deals with substance, and not form, and the "total of the term or terms" of sentence means, the total of the time actually to be served. If such were not the fact, in the case of sentences on

three or more counts running concurrently, the parole law would have no effect, in spite of the fact that it provides that "every prisoner * * * may be released on parole."

If the President by his commutation finds that relief afforded by parole is not adequate, it would be more reasonable to contend that a commutation superseded the right of parole, and that no parole would be allowed, than to contend for a modification of the right of parole as to the time when it could be invoked.

By Section 10, above quoted, while the President's power to commute is fully recognized, no intent or purpose is shown but that the parole law is fully subject, in its operation, thereto. No intention is shown in the law that the advantages of the parole law and commutation are only to be allowed in the alternative.

By this contention, that particular feature of the sentence which was modified by the commutation is qualified so as to give to the commuted sentence a different effect than is given to a sentence originally imposed to run concurrently by the Court. There is no more reason to suppose that a sentence of imprisonment is imposed without regard to the possibility [15] of commutation, than that it is pronounced without consideration of the opportunity afforded the prisoner to earn good time or parole.

The President's power to commute is conferred upon him by the Constitution and cannot be affected by legislative action, or impaired or undermined in any particular.

However, whether a pardon or commutation be considered as the executive of justice in mercy, or as an act of grace it is the substitution of something better for that which was. Then how can it be said, in effect, that that which is right should give way to that which is relatively wrong?

The prisoner has served one-third of the total sentences imposed. To argue otherwise is to attribute to the Act of Congress an intent to deny full effect to the action of the Executive, a thing not to be presumed in the absence of language conclusively showing such purpose and of doubtful effect, even if intended.

Ex parte Garland, 4 Wall. 333, at 380;

Ex parte William Wells, 19 How. 307;

United States vs. Wilson, 7 Pet. *150.

The writ of *mandamus* will issue, unless, within ten days, an appeal is taken.

“Filed in the U. S. District Court, Western District of Washington, Southern Division. Oct. 31, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy.” [16]

Findings of Fact and Conclusions of Law.

This cause having come on to be heard, plaintiff appearing in person, and by and through his attorney, John J. Sullivan, with permission of the Court, and the Court being fully advised in the premises and the law, and upon the files and records in this cause, makes the following

FINDINGS OF FACT.

I

That F. H. Duehay is the Superintendent of Prisons of the Department of Justice; that O. P. Halligan is the Warden of the United States Penitentiary at McNeil Island, Washington; that J. J. Leiser is the physician of the United States Penitentiary at McNeil Island, Washington.

II.

That on or about the 20th day of December, 1911, at the city of Los Angeles, State of California, in the United States District Court in and for the Southern Division of Southern California, plaintiff was convicted on two counts for receiving articles and things of value stolen from the United States mails, in violation of Section 5470 of the Revised Statutes of the United States; that under [17] and pursuant to the said judgment of conviction plaintiff was, by the Court, on or about the 3d day of January, 1912, sentenced on the first of said counts to serve four years in the United States Penitentiary at McNeil Island, Washington, and to pay a fine of \$1,000.00; on the said second count plaintiff was, by the Court, sentenced to serve four years in the said penitentiary and to pay a fine of \$1,000.00; said second sentence to commence at the expiration of the first of said sentences and to run consecutively to said first sentence.

III.

That on the 11th day of March, 1913, plaintiff did, under and pursuant to said judgment of conviction and said sentences, enter said penitentiary, and that plaintiff is now confined in said penitentiary.

IV.

That plaintiff, after his conviction and sentences, as aforesaid, made application to and did receive from the President of the United States, executive clemency, in that the said President of the United States, on the 5th day of August, 1913, issued his decree ordering and commuting plaintiff's two sentences to run concurrently, instead of consecutively, and that plaintiff's two four-year sentences do now run concurrently.

V.

That Congress on the 25th day of June, 1910, enacted an Act to Parole United States Prisoners and for Other Purposes (S. 870).

VI.

That the defendants under and by virtue of the terms of said Act compose and are the Parole Board for the said penitentiary.

VII.

That under and pursuant to said Act and the rules of said Parole Board approved by the Attorney General of the United States, all persons who are confined in the said penitentiary are permitted to apply for parole at the last regular meeting of the Parole Board, held at said penitentiary prior to the time when they will have completed [18] the total of the one-third of the term or terms of their sentence or sentences.

VIII.

That on the 10th day of July, 1914, plaintiff completed the total of one-third of the terms as commuted

by the President; that is to say, one-third of four years.

IX.

That in the month of May, 1914, the defendants, sitting as the Parole Board of the said penitentiary, held a regular meeting for the purpose of considering the applications for parole of all prisoners confined in said penitentiary who would be eligible for parole under the said Act in the months of June, July and August, 1914; that at said meeting of the said Parole Board, plaintiff made application to said Board for permission to file his application for a parole and to have same considered by said Board; that said Parole Board refused to permit plaintiff to file his application for parole at said meeting, and refused to consider plaintiff's qualifications for a parole, for the reason that the Attorney General had ruled that plaintiff would not become eligible for parole until he had served one-third of his original sentence, and that he would not become eligible for parole until November 9th, 1915.

X.

That under the ruling of the Parole Board and the Attorney General, plaintiff would be compelled to remain in the penitentiary until November 9th, 1915, before he would be permitted, under said construction of the meaning of the Parole Act, to have the right of parole.

XI.

That plaintiff has conformed to all the rules and regulations of said penitentiary regarding the duty and obligations of prisoners, and that he has not been

punished or reprimanded for any misconduct or wrongful behavior, and that the only reason for the refusal of said Parole Board to file his application, was the said ruling of the Attorney General. [19]

XII.

That plaintiff is a native-born citizen of the United States and is entitled to all the rights accruing to him under the form of pauper's act, approved June 25th, 1910. (36 Stat. 866.)

XIII.

That the action was tried by the Court, a jury having been waived on account of the fact that there were no questions of fact in dispute, and only questions of law.

Dated Nov. 16, 1914.

EDWARD E. CUSHMAN,
Judge of said Court.

IT IS HEREBY STIPULATED AND AGREED that the above were the facts in the above-entitled action.

Dated November 11th, 1914.

JOHN J. SULLIVAN,
Attorney for Plaintiff.

CLAY ALLEN,
G. P. FISHBURNE,
Attorneys for Defendant.

From the foregoing FINDINGS OF FACT the Court makes the following:

CONCLUSIONS OF LAW.

I.

That the President's power to commute is conferred upon him by the Constitution, and cannot be

affected by legislative action, or impaired or undermined in any particular.

II.

That a commutation of sentence by the President is to be considered as a substitution of something better for that which was, and that the act of the President in commuting plaintiff's sentence of four years on each count, running consecutively, to that of four years on each count, running concurrently, substitutes the commuted sentence for the sentence originally imposed by the Court.

III.

That the plaintiff, having served one-third of the term of his commuted sentence, has served one-third of the term to which he was sentenced, and is, therefore, entitled to a hearing for parole.

Signed this 16th day of November, 1914.

EDWARD E. CUSHMAN,

Judge. [20]

. Order [Directing Issuance of Writ of Mandamus, etc.].

This cause having come on to be heard, plaintiff appearing in person, and by and through his attorney, John J. Sullivan, with permission of the Court, and the Court being fully advised in the premises and the law, and upon the files and records in this cause, and having made its FINDINGS OF FACT and CONCLUSIONS OF LAW, makes the following ORDER.

1. That a writ of *mandamus* be issued, under seal of this Court, commanding F. H. Duehay, one of the

above-named defendants, to call a meeting of the Parole Board at McNeil Island, and that the above-named defendants, and each of them, be commanded to forthwith receive Fred H. Thompson's application for a parole, and the said defendants, and each of them, are hereby commanded to forthwith at said hearing give the said plaintiff, Fred H. Thompson, a fair, just and impartial hearing on his application for a parole.

2. The above-named defendants, and each of them, are hereby further commanded to do everything necessary to afford the plaintiff just and adequate relief in the premises.

Dated this 16th day of November, 1914.

EDWARD E. CUSHMAN,

Judge. [21]

"Filed in the U. S. District Court, Western District of Washington, Southern Division. Nov. 16, 1914. Frank L. Crosby, Clerk." [22]

Order Extending Time to Take Appeal [to November 12, 1914].

The attorneys on both sides of the above-entitled action having consented that the time for taking appeal in the said action be extended from the 10th day of November, 1914, to and including Thursday, the 12th day of November, 1914;

WHEREFORE IT IS ORDERED that the time for taking the appeal in the above-entitled action be and is hereby extended to and including Thursday, the 12th day of November, 1914.

Done in open court this 10th day of November, 1914.

EDWARD E. CUSHMAN,

Judge.

“Filed in the U. S. District Court, Western District of Washington, Southern Division. Nov. 9, 1914.

FRANK L. CROSBY,

Clerk.

By F. M. Harshberger,

Deputy. [23]

**Stipulation and Order Extending Time to Take
Appeal [to November 17, 1914].**

It is hereby stipulated and agreed by and between the attorneys for the plaintiff and defendants in the above-entitled cause, that the time for taking the appeal by the defendants be, and the same is hereby extended to Tuesday, November 17th.

JOHN J. SULLIVAN,

Attorney for Plaintiff.

CLAY, ALLEN & G. P. FISHBURNE,

Attorneys for Defendants.

It is ordered that the time for taking the appeal in the above-entitled action be and the same is hereby extended to and including Tuesday, November 17, 1914, and writ of mandate stayed in the meantime.

Dated this 12th day of November, 1914.

EDWARD E. CUSHMAN,

Judge.

“Filed in the U. S. District Court, Western Dis-

trict of Washington, Southern Division. Nov. 12, 1914.

FRANK L. CROSBY,

Clerk.

By F. M. Harshberger,

Deputy." [24]

Petition for Writ of Error.

The above-named respondents conceiving themselves aggrieved by the decision filed the 31st day of October, 1914, and the conclusions of law and the order dated and entered the 16th day of November, 1914, in the above-entitled cause, hereby pray the court for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit in said cause and that a transcript of the records, proceedings and papers on which said decision and judgment were made and entered, duly authenticated, may be sent to the said Circuit Court of Appeals of the United States for the Ninth Circuit.

Dated at Tacoma, Washington, this 16th day of November, 1914.

CLAY ALLEN,

G. P. FISHBURNE,

Attorneys for Respondents and Plaintiffs in Error.

The writ of error prayed for in the above cause be and is hereby granted this 16th day of November, 1914.

EDWARD E. CUSHMAN,

District Judge Residing in said District and Presiding Over said Court. [25]

"Filed in the U. S. District Court, Western Dis-

trict of Washington, Southern Division. Nov. 6, 1914.

FRANK L. CROSBY,
Clerk.

By E. C. Ellington,
Deputy." [26]

Assignments of Error.

Come now F. H. Duehay, Superintendent of Prisons of the Department of Justice, O. P. Halligan, Warden of the United States Penitentiary, McNeil Island, Washington, J. J. Leiser, Physician, United States Penitentiary, McNeil Island, Washington, respondents and plaintiffs in error, and Clay Allen and G. P. Fishburne, their attorneys, and say that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

That the Court erred in making Conclusion of Law II.

II.

That the Court erred in making Conclusion of Law III.

III.

That the Court erred in rendering its decision filed October 31, 1914. [27]

IV.

That the Court erred in making the order dated and filed November 16, 1914.

V.

That the Court erred in not holding that the petitioner could not be eligible to parole until he had

served one-third of the term as originally imposed, to wit: Eight years.

VI.

That the Court erred in holding that one-third of the total of the "term or terms for which he was sentenced" meant one-third of the term of the petitioner as commuted by the President, and in not holding that the words "term or terms" used in the statute referred to the original sentence imposed by the Court, to wit, eight years.

VII.

That the Court erred in not dismissing the complaint of the petitioner herein,

WHEREFORE the said respondents, F. H. Duehay, Superintendent of Prisons of the Department of Justice, O. P. Halligan, Warden of the United States Penitentiary, McNeil Island, Washington, J. J. Leiser, Physician United States Penitentiary McNeil Island, Washington, pray that the decision, order and judgment of the said District Court for the Western District of Washington, Southern Division, be in all things reversed.

CLAY ALLEN,

G. P. FISHBURNE,

Attorneys for Respondents and Plaintiffs in Error.

[28]

"Filed in the U. S. District Court, Western District of Washington, Southern Division. Nov. 16, 1914.

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,

Deputy." [29]

Writ of Error [Copy].

United States of Americt, the President of the United States of America, to the Honorable Judge of the District Court of the United States for the Western District of Washington, Southern Division, Greeting:

Because in the record and proceedings as also in the rendition of the decree and judgment of a cause which is in the above-entitled court before you between Fred H. Thompson, petitioner and defendant in error, and F. H. Duehay, Superintendent of Prisons of the Department of Justice, O. P. Halligan, Warden of the United States Penitentiary, McNeil Island, Washington, J. J. Leiser, Physician, United States Penitentiary, McNeil Island, Washington, respondents and plaintiffs in error, a manifest error hath happened to the damage of the said plaintiffs in error as by their answer and the record herein appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties [30] aforesaid in this behalf, do command you under your seal distinctly and openly that you send the records and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit together with this writ so that you have the same at San Francisco, California, in said Circuit on thirty days from the date of this writ in the said Circuit Court of Appeals, that the record and proceedings aforesaid being exhibited, the said Circuit Court of Appeals may cause further to be done therein to correct that error what by right and ac-

ording to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 16th day of November, 1914.

FRANK L. CROSBY,
Clerk of District Court of the United States for
Western District of Washington, Southern Division.

By E. C. Ellington,
Deputy Clerk.

Approved this 16th of November, 1914.

EDWARD E. CUSHMAN,
United States District Judge Presiding in the Above-
entitled Court.

Due and legal service of the within Writ of Error hereby acknowledged this — day of November, 1914.

Attorneys for Fred H. Thompson, Defendant in
Error.

“Filed in the U. S. District Court, Western District of Washington, Southern Division. Nov. 16, 1914.

FRANK L. CROSBY,
Clerk.

By E. C. Ellington,
Deputy.” [31]

Citation [on Writ of Error].

United States of America, the President of the
United States of America to Fred H. Thompson,
Defendant in Error, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court in the City of San Francisco and State of California, within thirty days from the date of this citation; to wit, within thirty days from November 16, 1914, pursuant to writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein F. H. Duehay, Superintendent of Prisons of the Department of Justice, O. P. Halligan, Warden of the United States Penitentiary, McNeil Island, Washington, and J. J. Leiser, Physician, United States Penitentiary, McNeil Island, Washington, are plaintiffs in error, and Fred H. [32] Thompson is defendant in error, to show cause, if any there be, why the decision and judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 16th day of November, 1914.

Judge of District Court of the United States for
Western District of Washington, Southern Division.

Due and legal service of the within Citation hereby acknowledged this — day of November, 1914.

_____,
Attorneys for Fred H. Thompson, Defendant in
Error.[33]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

United States of America,
Western District of Washington,—ss.

I, FRANK L. CROSBY, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the above-entitled cause as the same remains of record and on file in my office in said district at Tacoma, and that the same constitutes the return on the annexed Writ of Error.

I further certify that I attach hereto and herewith transmit the original Writ of Error, original Citation, and original Order Extending Time on Writ of Error, original Exhibits "A" and "B" and No. 1.

I further certify that the following is a full, true and correct statement of all expenses, costs and fees, and charges incurred and paid in my office by and on behalf of the Plaintiff in Error, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit;

Clerk's fees, (See 828 R. S. U. S. as amended

for making record, certificate or return 52

folios @ 30¢\$15.60

Because in the record and proceedings as also in the rendition of the decree and judgment in the cause which is in the above-entitled court before you between Fred H. Thompson, petitioner and defendant in error, and F. H. Duehay, Superintendent of Prisons of the Department of Justice, O. P. Halligan, Warden of the United States Penitentiary, McNeil Island, Washington, J. J. Leiser, Physician, United States Penitentiary, McNeil Island Washington, respondents and plaintiffs in error, a manifest error hath happened to the damage of the said plaintiffs in error as by their answer and the record herein appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties [36] aforesaid in this behalf, do command you under your seal distinctly and openly that you send the records and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit together with this writ so that you have the same at San Francisco, California, in said Circuit on thirty days from the date of this writ in the said Circuit Court of Appeals, that the record and proceedings aforesaid being exhibited, the said Circuit Court of Appeals may cause further to be done therein to correct that error what by right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the

United States, this 16th day of November, 1914.

FRANK L. CROSBY,

Clerk of District Court of the United States for
Western District of Washington, Southern Division.

By E. C. Ellington,
Deputy Clerk.

Allowed this 16th day of November, 1914.

EDWARD E. CUSHMAN,

United States District Judge Presiding in the Above-
entitled court.

Due and legal service of the within Writ of Error
hereby acknowledged this — day of November,
1914.

Attorneys for Fred H. Thompson, Defendant in
Error. [37]

[Endorsed]: No. —. United States Circuit
Court of Appeals for the Ninth Circuit. Fred H.
Thompson, Petitioner and Defendant in Error, vs.
F. H. Duehay, Superintendent, etc., et al., Respond-
ents and Plaintiffs in Error. Writ of Error. Filed
in the U. S. District Court, Western Dist. of Wash-
ington, Southern Division. Nov. 16, 1914. Frank
L. Crosby, Clerk. By E. C. Ellington, Deputy. [38]

*United States Circuit Court of Appeals for the Ninth
Circuit.*

No. 1659.

FRED H. THOMPSON,

Petitioner and Defendant in Error,

vs.

F. H. DUEHAY, Superintendent of Prisons of the
Department of Justice; O. P. HALLIGAN,
Warden of the United States Penitentiary,
McNeil Island, Washington; J. J. LEISER,
Physician, United States Penitentiary, Mc-
Neil Island, Washington,

Respondents and Plaintiffs in Error.

Citation [on Writ of Error (Original)].

United States of America, the President of the
United States of America to Fred H. Thompson,
Defendant in Error, Greeting:

You are cited and admonished to be and appear
in the United States Circuit Court of Appeals for the
Ninth Circuit at the courtroom of said court in the
City of San Francisco and State of California within
thirty days from the date of this citation, to wit,
within thirty days from November 16, 1914, pursuant
to writ of error filed in the clerk's office of the Dis-
trict Court of the United States for the Western
District of Washington, Southern Division, wherein
F. H. Duehay, Superintendent of Prisons of the De-
partment of Justice, O. P. Halligan, Warden of the
United States Penitentiary, McNeil Island, Wash-
ington, and J. J. Leiser, Physician, United States

Penitentiary, McNeil Island, Washington, are plaintiffs in error, and Fred H. [39] Thompson is defendant in error, to show cause, if any there be, why the decision and judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 16th day of November, 1914.

EDWARD E. CUSHMAN,
Judge of District Court of the United States for
Western District of Washington, Southern Division,

Due and legal service of the within Citation hereby acknowledged this 16th day of November, 1914.

JOHN J. SULLIVAN,
Attorneys for Fred H. Thompson, Defendant in
Error.

Received a copy of the Petition for Writ of Error, assignments of error, order allowing writ and writ of error this 16th day of November, 1914.

JOHN J. SULLIVAN,
Attorneys for Fred H. Thompson, Defendant in
Error. [40]

[Endorsed]: Original. No. —. United States Circuit Court of Appeals for the Ninth Circuit. Fred H. Thompson, Petitioner and Defendant in Error, vs. F. H. Duehay, Superintendent, etc., et al., Respondents and Plaintiffs in Error. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 16, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy.

[Marshal's Return on Service of Citation on Writ of Error, etc.]

United States of America,
Western District of Wash.,—ss.

I hereby certify and return that I served the annexed Citation together with Petition for Writ of Error, Assignment of Error and Writ of Error on the therein-named Fred H. Thompson by handing to and leaving true and correct copies thereof with John J. Sullivan, Esq., Atty. for Fred H. Thompson, Petitioner, personally at Seattle, in said District on the 16th day of Nov., A. D. 1914.

JOHN M. BOYLE,
U. S. Marshal.

By H. V. R. Anderson,
Deputy.

Marshal's fees, \$2.12. [41]

[Order Extending Time to File Record in Appellate Court to January 16, 1915.]

In the United States Circuit Court of Appeals, for the Ninth Judicial Circuit.

F. H. DUEHAY, Superintendent, etc., et al.,
Defendant and Plaintiff in Error,

vs.

FRED H. THOMPSON,
Plaintiff and Defendant in Error.

For good cause shown, IT IS NOW ORDERED that the time within which the Record and Return on Writ of Error in the above case may be filed in this

court at San Francisco, California, be and the same is hereby extended to and including the 16th day of January, A. D. 1915.

Dated this 12th day of December, A. D. 1914.

EDWARD E. CUSHMAN,

U. S. District Judge. [42]

[Endorsed]: No. ——. In the U. S. Circuit Court of the United States for the Ninth Circuit. Thompson, Defendant in Error, vs. Duehay, Supt. etc. et al., Plaintiffs in Error. Order Extending Time. Filed in the U. S. District Court. Western Dist. of Washington, Southern Division. Dec. 12, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. G. O. B. 128. [43]

[Endorsed]: No. 2533. United States Circuit Court of Appeals for the Ninth Circuit. F. H. Duehay, Superintendent of Prisons of the Department of Justice; O. P. Halligan, Warden of the United States Penitentiary, McNeil Island, Washington; and J. J. Leiser, Physician, United States Penitentiary, McNeil Island, Washington, Plaintiffs in Error, vs. Fred H. Thompson, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed December 31, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul T. O'Brien,
Deputy Clerk.

**[Plaintiff's Exhibit "A"—Order of President of
United States Commuting Sentences, etc.]**

WOODROW WILSON.

President of the United States of America.

To All to Whom These Presents Shall Come, Greeting:

WHEREAS, Fred H. Thompson was convicted in the United States District Court for the Southern District of California of receiving articles stolen from the mails,—two counts,—and on January third, 1912, was sentenced on each count to pay a fine of one thousand dollars and to be imprisoned for four years in the United States Penitentiary at McNeil Island,—sentence on the second count to commence on expiration of the first sentence; and,

Whereas, the case was taken on a writ of error to the Circuit Court of Appeals, Ninth Circuit, which court affirmed the judgment and sentence, February third, 1913; and,

Whereas, it has been made to appear to me that the said Fred H. Thompson is a fit object of executive clemency:

Now, therefore, be it known, that I, WOODROW WILSON, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby commute the sentences of the said Fred H. Thompson to run concurrently,—the fines to remain.

In testimony whereof, I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.

Done at the City of Washington this fifth day of August, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-eighth.

[Seal]

WOODROW WILSON,

By the President:

J. C. McReynold,

Attorney General.

[Endorsed]: Case No. 1659. United States District Court, Western District of Washington. Fred H. Thompson vs. F. H. Duehay et al. Plaintiff's Exhibit "A." Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 19, 1914. Frank L. Crosby, Clerk. By _____, Deputy. [44]

**[Plaintiff's Exhibit "B"—Rules Relating to
Application for Pardon.]**

**RULES RELATING TO APPLICATIONS FOR
PARDON.**

Department of Justice.

Washington, D. C., March 29, 1913.

1. All applications for pardon should be signed by two or more credible persons, be addressed to "The President of the United States," and be forwarded under cover to "The Attorney General" (except applications for pardon for desertion or other offenses against the military or naval laws, which should be addressed to the Secretary of War and the Secretary of the Navy, respectively), and the post-office address

of each person signing the application should be plainly stated. It is desirable that the petitioner should sign the application or in some way indicate his approval of the petition. When several petitions are filed in the same case, the applicant's approval of one of the petitions is sufficient.

2. The petition should state the name of the applicant, his age, where born, previous occupation, *place of residence*, the crime of which he was convicted, the Court, District, State, the sentence, date of sentence, the penitentiary or prison to which he was sentenced, and the grounds upon which pardon is asked. (See also Rule 12.) It is not necessary to furnish a copy of the indictment or other court papers.

3. When an application is received, it is referred at once, with the accompanying papers, to the United States Attorney for the District where the trial took place, with direction to submit his report and recommendation thereon, sending the statement of his predecessor when he did not himself appear in the case, and the statement of any special attorney for the Government who took part in the trial. He is also directed to obtain, if possible, the views of the trial Judge, and to fill out and return a blank form of docket entries, from which the warrant of pardon may be prepared. Reports are also secured from the appropriate officers of the several Executive departments, and from the Warden and Prison Physician in regard to the prisoner's conduct and physical condition.

4. A case once referred for reports will not be again referred without a written request from the

United States Attorney or the trial Judge; and a case once acted upon by the President will not be reopened, except upon the presentation of new and material facts.

5. When none of the persons so consulted advises clemency, the papers are not sent to the President except by his special request, or by special order of the Attorney General; but when any one of the officers consulted advises clemency the papers are submitted to the President.

6. As all applications for Executive clemency are sent to the United States Attorneys for report and docket entries, it is unnecessary and undesirable for applicants to apply to the Attorney or Judge, except in Alaska. (See Rule 14.)

7. Reports to the President by United States Attorneys, Judges, and other officials, on application for pardon, are treated as confidential, and are not open to inspection by the applicant or by any other person, except with the written assent of the Attorney, Judge, or official making the report, nor, if such assent be given, unless it be shown that the ends of justice require the disclosure. All other papers, except reports or communications to the President by officials, are open to inspection by the applicant and his attorney or representative, and by Members of Congress.

8. Applications and accompanying papers can not be withdrawn after they have been referred to the United States Attorney, unless copies thereof are provided by the applicant, at his own expense, for the files of the Department. Action will be withheld, however, by request of the petitioner or his attorney

at any time before the case has been sent to the President.

(Put in evidence.)

9. Applications will not be considered pending appeals from judgments of conviction; nor shortly before the expiration of sentence, except in unusually urgent and meritorious cases. Petitions for pardon should be filed sufficiently in advance of the expiration of sentence to enable the Attorney in Charge of Pardons to secure the necessary reports and to brief the case, and to allow the Attorney General ample time to consider the application and make his report and recommendation thereon to the President.

10. Petitions for pardon made merely for the purpose of restoring the applicant to full civil rights will not be considered by the President before expiration of sentence; but after the prisoner has been released for not less than *two years*, such an application may be filed. Frequently, however, a much longer period is required before favorable action is taken, dependent largely upon the nature of the offense and the character of the applicant both before and since his conviction. In cases of violation of a public trust involving personal dishonesty, five years' probation is usually required. All applications for pardon to restore civil rights must, in addition to the requirements of Rule 2, *state the present address of the petitioner, and be accompanied by affidavits from at least three reputable citizens* among whom the petitioner lives, stating that since his release from prison he has conducted himself in a moral and law-abiding manner, what his occupation has been, and what

knowledge they have in the premises.

11. When the President has acted, the applicant or his attorney is notified of the result. If pardon is granted, a warrant is at once prepared and sent to the applicant, either through the United States Marshal or the officer in charge of the place of imprisonment.

12. Applications for Executive clemency will not be considered where adequate relief may be obtained by parole. Neither will applications for pardon or commutation of sentence by life prisoners be entertained shortly before the period when they will be eligible to release on parole, to wit, at the expiration of fifteen years' actual imprisonment. Each applicant for clemency should state why he does not apply for parole and why a release thereunder would not substantially meet the requirements in his case. Applications for pardon are not entertained while prisoners are on parole.

13. The President's power to pardon does not extend to offenses against State or Territorial laws. Applications of this character should be sent to the Governor or Board of Pardons of the State or Territory where the offense was committed.

14. Applications for pardon for offenses committed in Alaska should be addressed to the President of the United States and be presented to the United States Attorney for the District in which the offense was committed, which officer will secure the necessary reports, mentioned in Rule 3, and forward the same, together with the docket entries and the petition and accompanying papers, to the Attorney General.

Rule 13 does not apply to Alaska, as the laws governing that Territory are enacted by Congress and not by a Territorial legislature.

15. It is also permissible, where the exigencies of a case require it, for a United States Attorney to submit his report and recommendation, together with the other reports he is required to secure, in advance of, and without a definite request from, the Attorney General; but in every such instance the docket entries should also be inclosed. (See Rule 3.)

JAMES C. McREYNOLDS,
Attorney General.

[Endorsed]: Case No. 1659. United States District Court, Western District of Washington. Fred H. Thompson vs. F. H. Duehay et al. Plaintiff's Exhibit "B."

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 19, 1914. Frank L. Crosby, Clerk. By ————, Deputy.

[Defendant's Exhibit No. 1—Letter, Dated February 2, 1914, Assistant Attorney General to Warden, U. S. Penitentiary.]

Department of Justice United States Penitentiary,
McNeil Island, Washington.

Copy. McG—WWD.

Bee, Wash.,

DEPARTMENT OF JUSTICE.

WASHINGTON, D. C.

February 2, 1914.

Mr. O. P. Halligan,
Warden U. S. Penitentiary,
McNeil Island Washington.

Sir:—

The department is in receipt of a letter of the 12th instant from Fred H. Thompson, a prisoner in your institution, presenting arguments as to why he should be eligible for parole when he has served one-third of four years. It appears that the prisoner was sentenced to serve four years each on two counts, the sentences to run consecutively and that subsequently the President commuted the sentence so that the terms would run concurrently.

Please inform the prisoner that the Department does not agree with his conclusion that he is eligible to parole when he has served one-third of the commuted sentence. It is the view of the Department

that he must serve one-third of his original sentence of eight years.

Respectfully,
For the Attorney General,
(Signed) ERNEST KNAEBEL,
Assistant Attorney General.

[Endorsed]: Case No. 1659. United States District Court, Western District of Washington. Fred H. Thompson vs. F. H. Duehay et al. Defendant's Exhibit No. 1.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 19, 1914. Frank L. Crosby, Clerk. By ———, Deputy.

